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No. 87-1590

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY SAGANSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

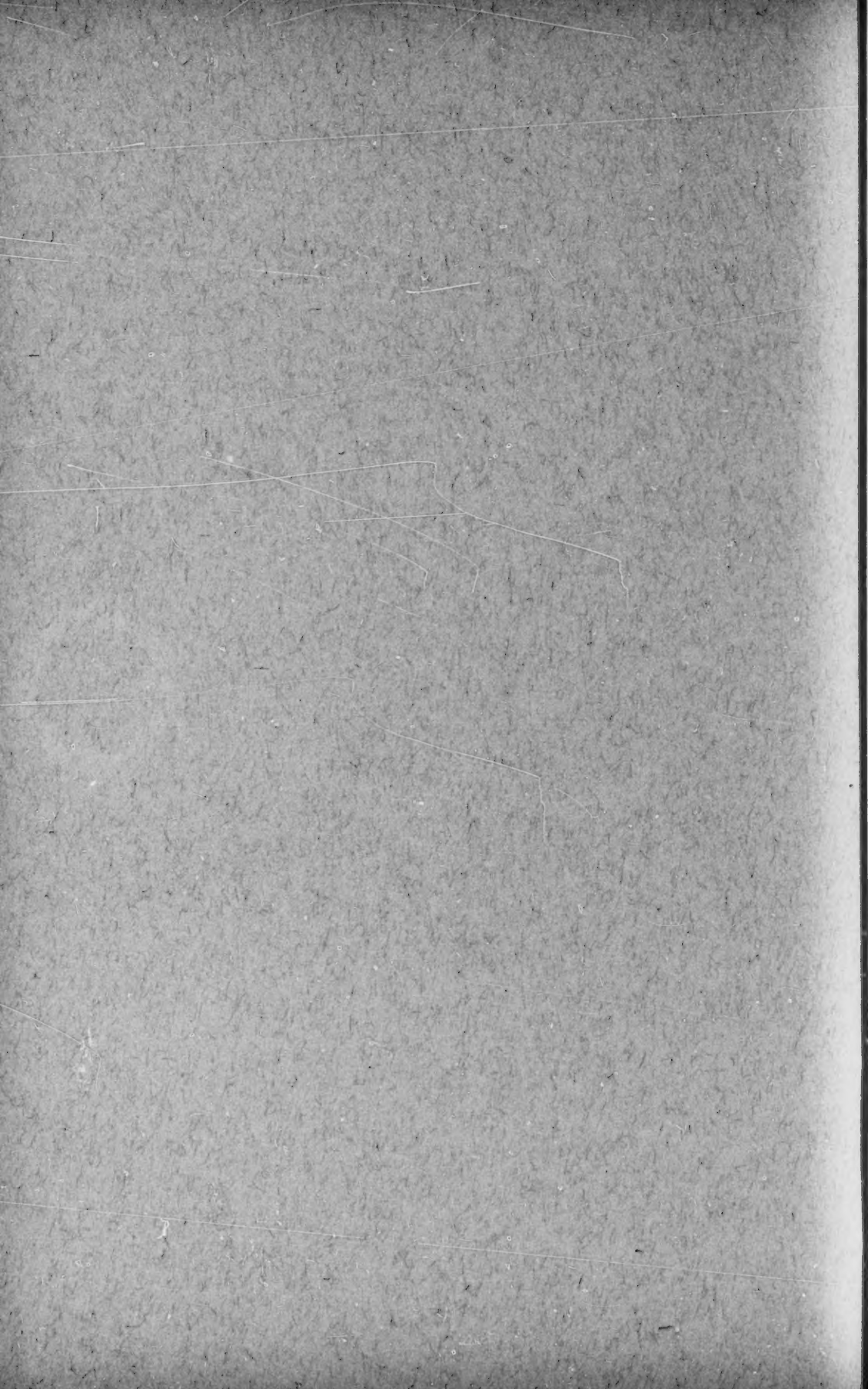
BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated petitioner's constitutional rights by finding petitioner, a 90-year-old man, to be in civil contempt and ordering him to be incarcerated unless and until he complies with an order to testify before the grand jury.



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OPINIONS BELOW

The memorandum and order of the court of appeals (Pet. App. A1-A2) is unreported. A related opinion of the court of appeals (Pet. App. A3-A8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1988. The petition for a writ of certiorari was filed on March 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 17, 1987, petitioner, who is 90 years old, was subpoenaed to testify before a grand jury. Petitioner appeared before the grand jury on July 1 but refused to testify, citing his Fifth Amendment privilege against compulsory self-incrimination. Upon the government's application, the district court entered a formal order of im-

munity, pursuant to 18 U.S.C. 6001 *et seq.*, requiring that petitioner testify. The order further provided that if petitioner refused to testify, the district court would consider contempt sanctions.

On December 16, petitioner again appeared before the grand jury, and again he declined to testify. Petitioner raised two objections to testifying. First, he asserted that his "age and state of health" were such that he feared that his truthful answers would "place [him] in jeopardy of [his] life and that no protection is available from the government" for him or for his wife sufficient to satisfy his fears, "given [his] age and the state of [his] health." Second, he contended that his attorney "ha[d] not received sufficient information" on the possible electronic surveillance of petitioner to advise him as to his rights with regard to any such surveillance. See Dec. 18, 1987 Mem. 1. In support of the first objection, at a hearing later that day, petitioner produced a medical report from his doctor stating that because of petitioner's medical condition "incarceration would certainly have a deleterious effect on his health, and indeed might even prove to be fatal" (Pet. App. A13).

After the hearing, the district court dismissed petitioner's first objection as "utterly spurious." The court explained (Dec. 18, 1987 Mem. 2) that "[h]aving reviewed the doctor's certificate in evidence, the Court finds that simply answering questions will subject the witness to no undue stress, and the concerns raised about the petitioner's health are of no moment should the witness comply with the Court's order and respond to the inquiries."¹ The court

¹ The district court also rejected petitioner's claim that the government could not adequately ensure his personal safety in the event that he testified. As the court put it (Dec. 18, 1987 Mem. 1-2):

It is not for the witness to determine the ability of the United States to enforce the laws concerning the community's peace and

also rejected petitioner's allegation that the government had engaged in illegal electronic surveillance. It found (*id.* at 3) upon a review of the government's in camera submission that "none of the questions sought to be put to the witness upon his return to the grand jury will derive in any way from any illegal electronic surveillance." The court accordingly directed petitioner to appear before the grand jury and testify or show cause why he should not be held in contempt of the court's order (*ibid.*).

On December 22, petitioner again refused to testify. The court then held him in contempt of court and ordered his confinement. After that order was entered, petitioner expressed a willingness to testify; on December 24, the district court stayed the order, on the condition that petitioner testify before the grand jury on January 6, 1988. On that date, however, petitioner again refused to testify and was incarcerated. Pet. App. A4.

On January 26, petitioner was released on bail pending appeal (Pet. 3). Petitioner thereafter submitted a medical report (Pet. App. A11-A12) that attested to a "marked deterioration in his overall health" resulting from a fall that petitioner had sustained while he was in confinement (*id.* at A11). The doctor stated that in his opinion petitioner's "recent stay in prison caused a definite deterioration in his precarious medical condition. His underlying medical conditions such as brain atrophy, hypothyroidism and fluid retention could lead to a major medical set back [*sic*] if there is any profound change in his environment." *Ibid.* Finding that petitioner "need[s] close medical follow up by the physicians most familiar with his case," the doctor concluded that petitioner's "recent prison experience

safety. The grand jury is entitled to his testimony so as better to ensure the enforcement of those laws and he cannot set this process at naught on the basis of his personal concerns.

caused a dramatic decline in his overall health which has, in part, been reversed within the past week at home" (*id.* at A12). The doctor also surmised that "further exposure to prison will be a clear hazard to [petitioner's] health" (*ibid.*).

2. The court of appeals affirmed the contempt order (Pet. App. A1-A2).² The court rejected the contention that, because incarceration could be life-threatening to petitioner, it was prohibited by the Fifth and Eighth Amendments. It noted (*ibid.*) that petitioner had been designated to the Federal Medical Prison Facility in Springfield, Missouri, and it explained that the government had agreed to transport petitioner to the medical facility by an air medi-vac plane equipped with a nurse. The court found (*id.* at A2) that those arrangements "answer[ed] [petitioner's] health concerns," and the court therefore saw "no constitutional impediment to [petitioner's] confinement." Finally, observing that "[t]he district court must have the means to enforce its lawful order of contempt" (*ibid.*), the court of appeals explained that petitioner "holds the key to his freedom" and that "[t]he government is validly seeking his testimony, not his confinement" (*ibid.*). The court concluded that "none of the medical information suggests that the witness' appearance or testimony before the grand jury would be harmful to his health" (*ibid.*).

ARGUMENT

As this Court explained in *United States v. Calandra*, 414 U.S. 338, 345 (1974), "[t]he duty to testify has long

² In a separate opinion (Pet. App. A3-A8), the court of appeals affirmed the district court's denial of petitioner's motion for disclosure of documents submitted to the court in connection with the question of electronic surveillance. The petition does not present that issue.

been recognized as a basic obligation that every citizen owes his Government." Accord *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932). Moreover, "[t]here can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance" (*ibid.*).

Petitioner does not dispute those propositions, but he contends that, in light of his health and advanced age, he should not be subject to the ordinary contempt powers of the court. The district court and court of appeals were mindful of petitioner's circumstances. But as the court of appeals recognized (Pet. App. A2), a "district court must have the means to enforce its lawful order of contempt." Petitioner was offered repeated opportunities to purge his contempt, and he may still do so at any time. Until he does so, however, petitioner "holds the key to his freedom" (*ibid.*), and his incarceration does not violate the Constitution.

1. Petitioner first contends (Pet. 8-12) that his incarceration would be "cruel and unusual," in light of "the fact that he will die if incarcerated" (Pet. 9). But the court of appeals, affirming the findings of the district court, found from the medical evidence in the record that petitioner's confinement in a medical prison facility would not endanger his life. The two letters submitted by petitioner's physicians do not suggest otherwise. First, although those letters noted that prison would have a deleterious effect on petitioner's health, neither letter predicted, as petitioner has put it, that petitioner "will die if incarcerated." Second, neither letter took account of the fact that petitioner will

be incarcerated in a medical prison facility, and that he will be transported there in an air medi-vac plane equipped with a nurse. In light of the concurrent findings of the courts below—that incarceration will not prove fatal for petitioner—this case does not present the constitutional questions raised in the petition.³

2. Petitioner next contends (Pet. 12-17) that, under the Due Process Clause of the Fifth Amendment, the district court was required to consider petitioner's medical evidence prior to ordering his incarceration. But the district court considered petitioner's evidence, finding it insufficient to warrant an exemption from the ordinary process of civil contempt. The court of appeals likewise considered petitioner's evidence, and it reached the same conclusion. At bottom, petitioner's disagreement is with the result reached by the courts below, not with the procedures they followed in reaching it.

³ In any event, to the extent that petitioner relies on the Eighth Amendment, that reliance is misplaced. The Eighth Amendment applies only to criminal punishment (*Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Ingraham v. Wright*, 430 U.S. 651, 671-672 n.40 (1977)), and incarceration for civil contempt does not constitute criminal punishment (*Shillitani v. United States*, 384 U.S. 364, 370 (1966) ("While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify.")).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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